Monument Mining Ltd & Anor v Emas Kehidupan Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-29–01 OF 2014
LIM CHONG FONG JC
26 FEBRUARY 2016

Contract — Agreement — Breach — Parties executed 'Earn–In' agreement — Allegation that Earn-In agreement entered based on warranty or representation of transfer — Whether erroneous — Whether transfer pre-condition to Earn-In agreement becoming effective — Whether plaintiffs should have waited for transfer to be effected before entering into Earn-In agreement — Whether plaintiffs in breach of contract for failure to further fund and carry out exploratory works required by cl 5.1(b) of earn in agreement

The plaintiffs, the defendants, Goldfield Assets Sdn Bhd and Himpunan Suci Sdn Bhd ('HSSB') jointly executed the 'Earn-In' agreement ('EIA') which was the core subject matter in dispute in this suit. Pursuant to a letter of award issued by the Pejabat Tanah Mersing, the State Government of Johor granted a mining lease to one Ungku Farouk ('U Farouk'). The lease was granted for a period of ten years. U Farouk and the first defendant entered into a memorandum of understanding ('MOU') for purposes of operating the aforesaid mining lease. HSSB was to be utilised as the special purpose vehicle to fulfil the condition. By reason of a law suit, U Farouk and the first defendant then entered into a variation of memorandum of agreement of understanding ('VMOU'). U Farouk then entered into a joint development agreement ('JDA') with the first defendant. HSSB requested from the Menteri Besar Johor for the transfer of MC1221 to HSSB. There was likewise no response from the Menteri Besar. HSSB wrote to U Farouk impressing upon him on the criticality to obtain the approval of the transfer of MC1221 to HSSB. The parties hereto eventually on 12 September 2011 together with Goldfield Assets Sdn Bhd and HSSB entered into the EIA. Pursuant to cl 5.1(a) the EIA, the second plaintiff paid 500,000 Canadian Dollars. By reason that MC1221 was not transferred to HSSB, the second plaintiff through its Canadian solicitor Messrs Gourley Spencer Wade LLP's letter dated 5 November 2012 notified the defendants of its intention to suspend work under the EIA. By a follow up letter of Messrs Gourley Spencer Wade LLP dated 19 November 2012, the plaintiffs notified the defendants and HSSB that unless the transfer of MC1221 is effected by 30 November 2012, the plaintiffs would rescind the contract for breach by the defendants and HSSB. Messrs Gourley Spencer Wade LLP again on 4 February and 6 February 2013 wrote to the second defendant and its solicitor, Messrs Sitham & Assoc that unless the mining lease MC1221 is transferred to HSSB

within 30 days, the second plaintiff would treat the second defendant to have breached the EIA. The second defendant averred that the second plaintiff is instead in breach of cl 5.1(b) of the EIA. The status quo remained and the plaintiffs filed this suit. The plaintiffs primarily contend that the defendants were in breach of warranty or representation for the non-transfer of MC1221 from U Farouk to HSSB. As the result, the plaintiffs seek, inter alia, a declaration that the EIA is rescinded for breach, refund of the payment of Canadian Dollars 500,000 and retransfer of the 1.5m shares in the first plaintiff. On the other side, the defendants contended that there was no warranty or representation that HSSB was the owner of MC1221, hence the plaintiff's contention that the EIA was entered based on the warranty or representation that the MC1221 would be transferred was wholly erroneous because HSSB was formed for the purpose of carrying out mining works pursuant to MC1221 in compliance with the express stipulations of the Johor State Government. Besides that, the transfer of MC1221 is not a pre-condition to the EIA becoming effective; otherwise the plaintiffs should have waited for the transfer to be effected before entering into the EIA. The plaintiffs hence assumed the commercial risks by entering into the EIA knowing well that it is the prerogative of the Johor State Government in approving the transfer. Furthermore the defendants contend that the second plaintiff was in breach of contract by its failure to further fund and carry out the exploratory works as required by cl 5.1(b) of the EIA.

Held:

(1) Since the transfer of the mining lease MC1221 has neither yet been approved nor effected at the point of execution of the EIA, it must rationally have been the presumed intention of the parties that the transfer ought to effected as represented and warranted within a reasonable time thereafter. Furthermore and even though an application for the transfer has earlier been made prior thereto, the defendants, Goldfield Assets Sdn Bhd and HSSB have the obligation pursuant to cl 2.3(d) of the EIA to utilise their best endeavours to procure and obtain that contemplated approval (see para 49).

(2) The fair and broad interpretation of the EIA require that the approval of the transfer of the mining lease MC1221 be obtained within the reasonable time of one year from the execution of the EIA with best endeavours put in by the relevant parties to seek the approval of the Johor State Government since the original mining lease would lapse in about two years thereafter. This was the sensible business expectation as it would otherwise be sheer commercial stupidity on the part of the plaintiffs. It was so because there was the real risk of forfeiture of the original mining lease if U Farouk was adjudicated a bankrupt. By then, the whole substratum of the EIA would have been lost (see para 50).

(3) Although the approval of the transfer of the mining lease was still the prerogative of the Johor State Government, the court was unable to accept the defendants' apposite contention that obtaining of the approval of the transfer of the mining lease MC1221 or otherwise was instead the commercial risk assumed by the plaintiffs. In other words, the plaintiffs, particularly the second plaintiff were bound by the EIA in any event. This proposition was out of sync, if not in contradiction, with the express provisions in cll 2.2(a) and 2.3 (d) of the EIA read together. Besides, if that was indeed the case, the parties would undoubtedly have inserted another clear express provision to that effect as it involved substantial upfront financial injection on the part of the plaintiffs that would be thrown away and wasted if that risk eventuated. It was not so inserted by reason that wasn't the contemplated bargain struck by the parties. Consequently, it was irrelevant that the plaintiffs ought to have waited for the approval of the transfer of the mining lease before executing the EIA as so contended by the defendants (see para 50).

(4) The defendants were unable to prove that they have since the execution of the EIA utilised their best endeavours to obtain the approval of the transfer of the mining lease MC1221 from the Johor State Government. They relied on the previous application and correspondences made and merely awaited for the outcome. This was undoubtedly a breach of contract on their part for non-fulfilment or performance of cl 2.3(d) of the EIA. The approval of the transfer was not obtained by the time the plaintiffs commenced this suit which was more than one year since the execution of the EIA. The plaintiffs were not in breach of contract (see para 50).

(5) The second plaintiff was entitled to rescind the EIA when the second plaintiff intimated its intention to do so. Ordinarily an innocent party so circumstanced would have forthwith rescinded the contract. The plaintiffs have met the four ingredients of unjust enrichment to sustain their restitutionary claim. This was plainly so because neither the purpose of the EIA materialised nor the defendants performed their part of the bargain stipulated in the EIA save for the transfer of the shares in the first defendant to the second plaintiff. It was therefore clearly inequitable for the defendants to indefinitely hold on to the financial injection made by the plaintiffs when the EIA was rescinded in the absence of fault of the plaintiffs. Otherwise it tantamounted to a forfeiture that obviously could not be sanctioned by the court. Consequently, there was the absence of basis for the defendants to retain the benefit derived from the EIA. There was substantial nearing total failure of consideration (see paras 52 & 55).

[Bahasa Malaysia summary

Plaintif-plaintif, defendan-defendan, Goldfield Assets Sdn Bhd dan Himpunan Suci Sdn Bhd ('HSSB') bersama-sama menyempurnakan

perjanjian 'Earn-In' ('PEI') yang merupakan perkara penting dalam pertikaian dalam guaman ini. Berikutan surat award yang dikeluarkan oleh Pejabat Tanah Mersing, Kerajaan Negeri Johor telah memberikan pajakan perlombongan kepada Ungku Farouk ('U Farouk'). Pajakan itu telah diberikan untuk tempoh sepuluh tahun. U Farouk dan defendan pertama telah memasuki memorandum persefahaman ('MP') bagi tujuan menjalankan pajakan perlombongan tersebut. HSSB digunakan sebagai tujuan khas memenuhi syarat itu. Oleh sebab guaman undang-undang, U Farouk dan defendan pertama kemudian telah memasuki pengubahan memorandum perjanjian persefahaman ('PMPP'). U Farouk kemudian memasuki perjanjian pembangunan bersama ('PPB') dengan defendan pertama. HSSB telah memohon daripada Menteri Besar Johor untuk memindahkan MC1221 kepada HSSB. Begitu juga tiada sebarang maklum balas daripada Menteri Besar. HSSB menulis kepada U Farouk untuk menunjukkan kepadanya keadaan kritikal untuk mendapatkan kelulusan pemindahan MC1221 kepada HSSB. Pihak-pihak berkenaan akhirnya pada 12 September 2011 bersama-sama dengan Goldfield Assets Sdn Bhd dan HSSB memasuki PEI itu. Menurut klausa 5.1(a) PEI, plaintif kedua telah membayar 500,000 Dolar Kanada. Oleh sebab MC1221 tidak dipindahkan kepada HSSB, plaintif kedua melalui surat peguambela Kanadanya iaitu Tetuan Gourley Spencer Wade LLP bertarikh 5 November 2012 yang memberitahu defendan-defendan tentang niatnya untuk menggantung kerja di bawah PEI itu. Melalui surat susulan Tetuan Gourley Spencer Wade LLP bertarikh 19 November 2012, plaintif-plaintif telah memberitahu defendan-defendan dan HSSB bahawa kecuali jika pemindahan MC1221 dikuatkuasakan pada 30 November 2012, plaintif-plaintif akan membatalkan kontrak itu kerana pelanggaran oleh defendan-defendan dan HSSB. Tetuan Gourley Spencer Wade LLP sekali lagi pada 4 Februari dan 6 Februari 2013 menulis kepada defendan kedua dan peguambelanya, Tetuan Sitham & Assoc bahawa kecuali jika pajakan perlombongan MC1221 dipindahkan kepada HSSB dalam tempoh 30 hari, plaintif kedua akan menganggap defendan kedua telah melanggar PEI itu. Defendan kedua menegaskan bahawa plaintif kedua sebaliknya telah melanggar klausa 5.1(b) PEI. *Status quo* itu kekal dan plaintif-plaintif telah memfailkan guaman ini. Plaintif-plaintif terutamanya berhujah bahawa defendan-defendan telah melanggar waranti atau representasi untuk pemindahan MC1221 yang tidak berlaku daripada U Farouk kepada HSSB. Akibatnya, plaintif memohon, antara lain, deklarasi bahawa PEI itu dibatalkan kerana pelanggaran, dikembalikan bayaran 500,000 Dolar Kanada dan memindah balik 1.5 juta syer dalam plaintif pertama. Sebaliknya, defendan-defendan berhujah bahawa tiada waranti atau representasi bahawa HSSB adalah pemilik MC1221, justeru hujah plaintif bahawa PEI telah dimasuki berdasarkan waranti atau representasi yang MC1221 akan dipindahkan adalah salah keseluruhannya kerana HSSB dibentuk bagi tujuan menjalankan kerja perlombongan menurut MC1221 bagi mematuhi penetapan nyata Kerajaan Negeri Johor. Selain itu, pemindahan MC1221

bukan prasyarat kepada PEI berkuat kuasa; jika tidak plaintif-plaintif patut menunggu untuk pemindahan itu dilaksanakan sebelum memasuki PEI itu. Plaintif-plaintif justeru itu mengambil kira risiko komersial dengan memasuki PEI dan mengetahui bahawa ia adalah prerogatif Kerajaan Negeri Johor dalam meluluskan pemindahan itu. Tambahan pula defendan-defendan menegaskan bahawa plaintif kedua telah melanggar kontrak itu oleh kerana kegagalannya untuk seterusnya membiaya dan menjalankan kerja-kerja meneroka sepertimana dikehendaki oleh klausa 5.1(b) PEI.

Diputuskan:

(1) Oleh kerana pemindahan pajakan perlombongan MC1221 masih belum diluluskan atau dilaksanakan pada masa penyempurnaan PEI itu, ia adalah rasional untuk menganggap niat pihak-pihak yang pemindahan itu patut dilaksanakan sepertimana dikemukakan dan dikehendaki dalam masa munasabah selepas itu. Tambahan pula dan meskipun permohonan untuk pemindahan telah dibuat terdahulu dari itu, defendan-defendan, Goldfield Assets Sdn Bhd dan HSSB mempunyai obligasi menurut klausa 2.3(d) PEI untuk menggunakan sedaya upaya mereka untuk memperoleh dan mendapatkan kelulusan yang dijangkakan itu (lihat perenggan 49).

(2) Tafsiran adil dan luas PEI itu menghendaki agar kelulusan pemindahan pajakan pelombongan MC1221 diperoleh dalam masa yang munasabah iaitu setahun dari penyempurnaan PEI dengan sedaya upaya dimasukkan oleh pihak-pihak berkaitan untuk memohon kelulusan Kerajaan Negeri Johor oleh kerana pajakan perlombongan asal akan luput leih kurang dua tahun selepas itu. Ini adalah jangkaan perniagaan yang munasabah kerana ia sebaliknya adalah kelemahan komersial di pihak plaintif-plaintif. Ia begitu kerana terdapat risiko sebenar halang tebus pajakan perlombongan asal jika U Farouk diadjudikasikan seorang bankrap. Pada masa itu, keseluruhan substratum PEI akan hilang (lihat perengan 50).

(3) Walaupun kelulusan pemindahan pajakan perlombongan masih prerogatif Kerajaan Negeri Johor, mahkamah tidak boleh menerima hujah defendan-defendan bahawa memperoleh kelulusan pemondahan pajakan perlombongan MC1221 atau jika tidak sebaliknya risiko keomersial yang diambil oleh plaintif-plaintif. Dalam ertikata lain, plaintif-plaintif, terutamanya plaintif kedua adalah terikat oleh PEI dalam apa-apa keadaan. Cadangan ini tidak selaras, jika tidak bertentangan, dengan peruntukan nyata dalam klausa-klausa 2.2(a) dan 2.3(d) PEI dibaca bersama. Selain itu, jika itu adalah kesnya, pihak-pihak tanpa ragu telah memasukkan satu lagi peruntukan nyata yang jelas kerana ia melibatkan kemasukan kewangan pendahuluan yang banyak di pihak plaintif-plaintif yang adakan dibuang dan dibazirkan jika risiko

tersebut dihadapi. Jika tidak dimasukkan oleh sebab ia bukan tawaran yang dijangkakan yang diperolehi oleh pihak-pihak. Akibatnya, ia tidak relevan bahawa plaintif-plaintif patut menunggu kelulusan pemindahan pajakan perlombongan itu sebelum pelaksanaan PEI sepertimana dihujahkan oleh defendan-defendan (lihat perenggan 50).

(4) Defendan-defendan tidak dapat membuktikan bahawa mereka sejak penyempurnaan PEI telah menggunakan sedaya upaya mereka memperoleh kelulusan pemindahan pajakan perlombongan MC1221 daripada Kerajaan Negeri Johor. Mereka bergantung kepada permohonan terdahulu dan hubungan yang dibuat dan hanya menunggu keputusannya. Ini tanpa ragu suatu pelanggaran kontrak di pihak mereka kerana tidak memenuhi atau melaksanakan klausa 2.3(d) PEI itu. Kelulusan pemindahan itu tidak diperoleh pada masa plaintif-plaintif memulakan guaman ini yang lebih daripada satu tahun sejak pelaksanaan PEI itu. Plaintif-plaintif tidak melanggar kontrak itu (lihat perenggan 51).

(5) Plaintif kedua berhak membatalkan PEI itu apabila plaintif kedua menyatakan niatnya untuk berbuat demikian. Biasanya pihak yang jujur dalam keadaan itu akan membatalkan kontrak itu. Plaintif-plaintif telah memenuhi empat elemen untuk keuntungan tidak adil bagi mengekalkan tuntutan restitusi mereka. Ini jelas kerana bukan tujuan PEI dilaksanakan ataupun defendan-defendan melaksanakan di pihak mereka tawaran yang dinyatakan dalam PEI itu kecuali pemindahan syer dalam defendan pertama kepada plaintif kedua. Oleh itu ia jelas tidak saksama untuk defendan-defendan untuk memegang tanpa had masa kemasukan kewangan yang dibuat oleh plaintif-plaintif apabila PEI itu dibatalkan tanpa kewujudan apa-apa kegagalan plaintif-plaintif. Sebalikya ia sama seperti suatu halang tebus yan jelas tidak boleh dibenarkan oleh mahkamah. Akibatnya, tidak terdapat asas untuk defendan-defendan untuk menahan faedah yang wujud daripada PEI itu. Terdapat kegagalan substantial hampir keseluruhan balasan itu (lihat perenggan 52 & 55).]

Notes

For cases on breach of agreement, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3278–3286.

Cases referred to

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 2 AMR 205; [2010] 1 CLJ 269, FC (refd)

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)

Damasara Realty Bhd v Bungsar Hills Holding Sdn Bhd & Anor [2011] 6 MLJ

170; [2011] 4 CLJ 16, CA (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
LSSC Development Sdn Bhd v Thomas a/l Iruthayam and Anor [2007] 4 MLJ 1; [2007] 2 CLJ 484, CA (refd)
MBF Holdings Bhd and Anor v Dato' Loy Teik Ngan & Anor [2015] 1 AMCR 21, CA (refd)
Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2003] 4 MLJ 357; [2003] 4 CLJ 294, CA (refd)
Muralidhar Chatterjee v International Film Co Ltd AIR 1943 PC 34, HC (refd)
Prenn v Simmonds [1971] 3 All ER 237, HL (refd)
Societe Maritime et Commerciale v Venus Steam Shipping Co Ltd (1904) 9 Com Cas 289 (refd)

Legislation referred to

Contracts Act 1950 ss 47, 65
Evidence Act 1950 ss 92, 93, 94
Mining Enactment Johor No 69

Mohamed Haniff Kahtri Abdullah (K Selva Kumaran and Mohamad Nadzim Ibrahim with him) (Azwan & Nadzim) for the plaintiffs.
V Sithambaram (Sitham & Assoc) for the defendants.

Lim Chong Fong JC:

INTRODUCTION

[1] This is a suit for restitution arising from an 'Earn-In' agreement for gold prospecting/exploration activities in Mersing, Johor Darul Takzim.

[2] The plaintiffs are related companies with gold mining expertise. The second plaintiff is a wholly owned Malaysian incorporated subsidiary of the first plaintiff, a Canadian listed incorporated company.

[3] The first and second defendants are Malaysian companies whilst the third defendant is a Malaysian individual.

[4] The plaintiffs, defendants, Goldfield Assets Sdn Bhd and Himpunan Suci Sdn Bhd ('HSSB') jointly executed the 'Earn-In' agreement dated 12 September 2011 ('EIA') which is the core subject matter in dispute in this suit.

THE TRIAL PROCESS

[5] The trial of this suit took four days on 15 and 16 April 2015 and 22 and 23 October 2015.

[6] The trial documents were marked as Bundles A, B1, B2, C, C1, D, D1, D2, E, F and G. The documentary evidence are contained in Bundles, B1, B2, C, C1, D, D1 and D2 which were agreed by the parties to be of unconditional status B. In the course of the trial, there were also exhs P1 to D11 that were admitted in evidence.

[7] The following witnesses testified at the trial for the respective parties:

(a) Muhamad Fahrul bin Khalid ('PW1'), the assistant land administrator at the Mersing Land Office;

(b) Zaidi bin Harun ('PW2'), a director of both plaintiffs;

(c) Robert Frederick Baldock ('PW3'), the chief executive officer and a director of the first plaintiff as well as a director of the second plaintiff;

(d) Dr Mohamed Iwaz Karim ('DW1'), a director of the first defendant; and

(e) Peter Steven Kestel ('DW2'), a director of the first and second defendants.

[8] After the trial, the parties submitted their written closing submissions with case authorities in support thereof. I heard oral clarification from counsel on 22 January 2016.

BACKGROUND FACTS

[9] Pursuant to a letter of award dated 25 April 2003 ('letter of award') issued by the Pejabat Tanah Mersing, the State Government of Johor pursuant to the State Mining Enactment ('No 69') granted a mining lease as evidenced by the mining certificate No 1221 ('MC1221') dated 16 August 2004 over a piece of land described as Lot PTD 1749, Mukim Penyabong, Daerah Mersing, Johor to a Ungku Farouk bin Ungku Ibrahim ('U Farouk').

[10] The lease was granted for a period of ten years and subject to the express conditions as contained in the letter of award and MC1221.

[11] The provisions in the letter of award are, inter alia, as follows:

Adalah dimaklumkan bahawa Majlis Mesyuarat Kerajaan Johor dalam mesyuaratnya pada 26.3.2002 sebagaimana R/M Bil 756/2003 telah BERSETUJU permohonan pajakan melombong bagi tujuan melombong emas di atas tanah PTD 1749 seluas 633.611 ekar (255.414 hektar) di Mukim Penyabong, Mersing dengan dikenakan bayaran dan syarat sebagaimana berikut:

1.1 Dikenakan bayaran royalty sebanyak 5% dibayar kepada Kerajaan Negeri.

1.2 Syarikat hendaklah memperuntukkan saham kepada YPJ sebanyak 20%.

1.3 Pemohon hendaklah membuka sebuah Syarikat Sdn Bhd bagi menentukan bahawa Modal yang mencukupi diperolehi bagi melaksanakan kerja-kerja melombong.

1.8 Majlis juga bersetuju sekiranya ada kayu-kayu berharga di kawasan tersebut hendaklah dikeluarkan secara tender dan menjadi hasil kepada Kerajaan Negeri:

i. Syarat sekatan milik.

[12] The provisions in MC1221 are, inter alia, as follows:

(a) Tanah yang diluluskan ini tidak boleh dipindahmilik, dicagar atau dilepaskan dengan apa cara sekalipun melainkan setelah mendapat persetujuan bertulis daripada Penguasa Negeri. Tanah ini juga hendaklah memajakan kepada Syarikat yang mempunyai saham sekurang-kurangnya 40% saham Bumiputera.

(m) Sekiranya didapati pemohon melanggar salah satu daripada syarat-syaratnya di atas, kerajaan berhak membatalkan/menarik balik lesen perusahaan ini dengan serta-merta dan pemohon tidak boleh menuntut apa-apa bayaran ganti rugi dan wang amanahnya dirampas.

[13] On 10 April 2008, U Farouk and the first defendant entered in to a memorandum of understanding ('MOU') for purposes of operating the aforesaid mining lease. Pursuant thereto, HSSB is to be utilised as the special purpose vehicle to fulfil the condition stipulated in the letter of award and MC1221.

[14] The provisions in the MOU are, inter alia, as follows:

A(1) Upon the execution of this Memorandum, U Farouk shall allow Emas Kehidupan, at its absolute discretion, to conduct any and all exploration activities, including, without limiting the generality of the foregoing, surveys, drilling, taking and collecting and extracting samples, geological, metallurgical, geotechnical, hydrological or other technical work to develop the Mining Land as Mining Project ('Project') and towards preparing a bankable feasibility study in accordance with the international banking standards for a period of one year from the date of signing this MOU. As consideration, U Farouk shall be paid a sum of Ringgit Malaysia Fifty Thousand (RM50,000) as an initial payment by Emas Kehidupan;

A(2) U Farouk shall then diligently pursue an application to the Government of the State of Johor for purposes of obtaining the Exco's approval for the sub-leasing of the MC1221 to Himpunan Suci Sdn Bhd (807610-X) (hereinafter referred to as Himpunan Suci) and the registering of the said sub-lease ('Sub-Lease') in favour of Himpunan Suci. Himpunan Suci shall have the following respective Participating Interests of the Parties (and if required, the Participating Interest of Yayasan Pelajaran Johor) shall as at the date hereof be as follows:

Emas Kehidupan	:	55%
U Farouk	:	25%
Yayasan Pelajaran Johor	:	20%

A(4) If, within a year of the date of this MOU, Emas Kehidupan decides (at its absolute discretion) to proceed with the Transaction, and

(a) Provided that U Farouk has successfully obtained the approval from the Government of the State of Johor to sub-lease MC1221 to Himpunan Suci; and

(b) Has duly registered the Sub-Lease of MC1221 to Himpunan Suci; then subject to the terms of this MOU, U Farouk will sell and Emas Kehidupan will purchase 55% of the then shareholding of U Farouk (or that of his nominees) in Himpunan Suci for valuable consideration in the sum of Ringgit Malaysia One Million Four Hundred Fifty Thousand (RM1,450,000,000) ('Purchase Price') as payment to purchase the said shares. The Purchase Price shall be payable by Emas Kehidupan to U Farouk as follows:

(i) A sum of Ringgit Malaysia Two Hundred Fifty Thousand (RM250,000) on the last to occur of the registration of the Sub-Lease or the exercise of Emas Kehidupan's right to proceed with the transaction;

(ii) The sum of Ringgit Malaysia Two Hundred Fifty Thousand (RM250,000) three months from payment referred to in sub-clause A(4)(i) above and three more payments each in the sum of Ringgit Malaysia Two Hundred Fifty Thousand (RM250,000) paid consecutively every third month after the previous payment;

(iii) A final payment of Ringgit Malaysia Two Hundred Thousand (RM200,000) three months from the last of the payments referred to in the previous sub-clause A(4)(ii); and

(iv) If Emas Kehidupan fails and/or neglects to make any of the payment as set out in paragraph (i), (ii) or (iii), U Farouk shall, after first giving to Emas Kehidupan 14 days written notice of its default, and Emas Kehidupan failing within a further 14 Days to remedy such default, have the liberty to treat this MOU and the Transaction as being mutually terminated. All payments already made by Emas Kehidupan to U Farouk shall be forfeited.

C(1) U Farouk and Himpunan Suci represents and warrants to Emas Kehidupan (and acknowledge that Emas Kehidupan is relying upon these representations and warranties in entering this MOU) that:

> (e) Himpunan Suci beneficially owns and possesses the interest in the sub-lease of MC1221 free and clear of any encumbrances, save and except statutory liens, and other inchoate liens or otherwise at law and U Farouk and Himpunan Suci have, except as specifically set forth in this MOU, all necessary power and good and sufficient right and authority to sell and transfer the shares in Himpunan Suci hereunder to Emas Kehidupan;
>
> (i) There are no actual, pending or threatened actions, suits, claims or proceedings regarding MC1221 Mining Lease of which U Farouk or Himpunan Suci are aware.

[15] Consequently, U Farouk on 9 July 2008 wrote to the Mersing Land Office to apply for the transfer of MC1221 to HSSB. There was no response from the Mersing Land Office.

[16] By reason of a law suit filed against U Farouk vide Johor Bahru High Court Bankruptcy Suit No 29–3472 of 2007, U Farouk and the first defendant then on 8 October 2008 entered into a variation of memorandum of agreement of understanding ('VMOU').

[17] The provisions in the VMOU are, inter alia, as follows:

1. The parties agree that the following additions, variations and/or amendments to the Memorandum of Understanding shall apply:

> (A) Johor Bahru High Court Bankruptcy No 29–3472–2007
>
> It is agreed that any adverse order of the Court in due process, would jeopardize U Farouk bin U Ibrahim's interest on the Mining Lease 1221. The commitment of an act of Bankruptcy as defined by the Bankruptcy Act of Malaysia, would legally incapacitate U Farouk bin U Ibrahim and resulting in the forfeiture of the Mining Lease 1221. In such circumstances, all the efforts and investments made in the project shall be rendered useless and at loss.
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> Emas Kehidupan thus hereunder agrees to assist U Farouk bin U Ibrahim to settle the outstanding balance due to HSBC Bank Malaysia Bhd of Collection and Recovery Unit, Aras 8, 19–21, Leboh Pasar Besar, 50050 Kuala Lumpur (hereinafter referred to as 'HSBC'), prior to the hearing of the Suit that is fixed on 14th October 2008.
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> It was also agreed that the solicitors representing U Farouk bin U Ibrahim in the Suit, shall initiate negotiations with HSBC to determine the total outstanding balance due and accordingly inform Emas Kehidupan for instruction.
>
> (B) Transfer of Mining Lease

In the light of the foregoing circumstances, parties thereafter agree that all efforts shall be accelerated and treated with priority for purposes of registering the transfer of the sub-lease of MC1221 to Himpunan Suci Sdn Bhd. All efforts towards the realisation of the transfer to Himpunan Suci Sdn Bhd must commensurate in the same time line with the full settlement of the outstanding balance due to HSBC, that is within a period approximately that of six weeks from the date hereof.

It is also for the very said purpose, U Farouk bin U Ibrahim will seek an urgent meeting with Yayasan Pelajaran Johor to finalise each consecutive parties agreement on the recommendation for a change in clause 1.2 in the letter of Pejabat Tanah Daerah Mersing dated 25 April 2003 and on reaching the agreement to submit such agreement to the Commissioner of Land and Mines Johor to effect the transfer in the Executive Council Johore.

(D) Preliminary Drilling Program

It would thus be prudent for Emas Kehidupan Sdn Bhd to only commence drilling activities upon the approval of the transfer of the Mining Lease 1221 and registration of the same to Himpunan Suci Sdn Bhd.

(G) Renegotiation of the Terms and Conditions of the Memorandum of Understanding

Both parties are unanimous that the terms in the Memorandum of Understanding including the respective equity position of the parties may change taking into consideration the additional risks now assumed by Emas Kehidupan Sdn Bhd.

It is agreed that both parties will enter into negotiations in the coming weeks with a view of affecting the changes as specified herein in the Memorandum of Understanding including changes and adjustment to the equity position held by the parties.

[18] U Farouk then entered into a joint development agreement dated 19 January 2009 ('JDA') with the first defendant.

[19] The provisions in the JDA are, inter alia, as follows:

A. ESTABLISHMENT AND OBJECTS OF HIMPUNAN SUCI SDN BHD

1. The objects and extent of the Himpunan Suci are:

1.1 to maintain the Tenements

1.2 to conduct Exploration

1.3 to conduct Mining Operations

4. Himpunan Suci shall be the sole and primary company that will own MC1221 of which the application for a transfer of the ownership of MC1221 from U Farouk to Himpunan Suci have been formally submitted to the State Government (Appendix-2).

6. Himpunan Suci is therefore a special purpose company for the ownership of Mining Certificates/Leases, Mining Licenses and Exploration or Prospecting Permits and shall not have any other role or function other that stipulated herein.

D. OBLIGATION OF PARTIES

3. U Farouk further covenants with Emas Kehidupan:

(i) He shall diligently follow up with the relevant authorities as regards to the registration of the transfer of MC1221 to the incorporated Himpunan Suci;

(ii) He shall do all things which may from time to time be necessary or desirable to keep in full force and effect the title to the Tenements;

(iii) Upon signing this agreement he cannot act and pursue any action or a course of action contrary to the interests and well being of the directors and share holders of Himpunan Suci and that he lacks capacity to represent Himpunan Suci either directly or indirectly or transmit any information of its affairs including any technical and financial reports without reference and consultations with the directors and share holders and neither can he apply on his own accord any new mining leases including prospecting permits for himself or act as a consultant or nominee of other persons institutions or interests with respect to mining activities in the State of Johor;

(iv) Subject to approvals from the relevant authorities or conditions imposed by relevant authorities (if any) it shall do everything reasonably possible and execute all appropriate documents for the purpose of registering the Participating Interests of each of the Parties in MC1221 and any changes to those Participating Interests;

(v) It shall not knowingly do anything or knowingly omit to do anything which will jeopardize the approvals granted by the relevant authorities in respect of the Tenements; and

(vi) It shall render all assistance to Emas Kehidupan in its performance of Clause 4 above;

H. Commencement of the Technical Analysis

1. Parties hereby agree that the commencement of the technical analysis which would include conducting a preliminary drilling programme on the project shall be after having been notified officially in writing of the approval of the transfer of the MC1221 to Himpunan Suci.

[20] On 20 February 2009, HSSB wrote to the Menteri Besar Johor to again request for the transfer of MC1221 to HSSB. There was likewise no response from the Menteri Besar.

[21] On 12 August 2009, HSSB wrote to U Farouk impressing upon him on the criticality to obtain the approval of the transfer of MC1221 to HSSB.

[22] On 8 February 2010, the Mersing Land Office wrote to U Farouk informing that the State Government of Johor has met the requirement of the grant of MC1221 by having incorporated a company HSSB to operate the mining lease with YPJ Holdings Sdn Bhd to have a 20% shareholding therein.

[23] Subsequently on 17 February 2010, HSSB again wrote to the Mersing Land Office to request for the transfer of MC1221 to HSSB. Then on 31 March 2010, HSSB followed up by enclosing the completed application form for the transfer of MC1221 to the Mersing Land Office. There was again no response to both the letters from the Mersing Land Office.

[24] The parties hereto eventually on 12 September 2011 together with Goldfield Assets Sdn Bhd and HSSB entered into the EIA.

[25] The provisions in the EIA are, inter alia, as follows with emphasis added:

Recital

(A) Pursuant to the Johore State Executive Council Meeting's agreement in allowing U Farouk to enter upon and carry out prospecting activities and mine the land described as Batu 11, Jalan Mersing Endau, PTD 1749, Mukim Penyabong, Daerah Mersing, Johor Darul Takzim, Malaysia, measuring approximately 663 acres 2 rood 17 pol (hereinafter referred to as the '*said Mining Land*'), wherein a Letter of Award from Pejabat Tanah Mersing (Ref Bil 53 dalam PTD(MG)4/1/87(E)) dated 25th April 2003 (hereinafter referred to as the '*Letter of Award*'), was issued to U Farouk, describing the same with certain conditions. Copy of the Letter of Award dated 25th April 2003 is exhibited in *Exhibit A*, attached hereto and incorporated herein by this reference.

(B) Pursuant to a Mining Certificate No 1221 dated 16th August 2004 (hereinafter referred to as the '*MC1221*') which was accordingly issued to U Farouk in pursuit of the Letter of Award. Copy of the MC1221 is exhibited in *Exhibit B*, attached hereto and incorporated herein by this reference.

(C) Pursuant to the Joint Development Agreement dated 8th January 2010 (hereinafter referred to as the '*JV Agreement*'), U Farouk and EK have mutually agreed, as set out in the Agreement on the organisation, construction and management and operation of the Earn-In Venture contemplated herein (the Emas Kehidupan '*Earn-In Venture*') for Exploration within MC1221. Parties have also mutually agreed to the formation of HSSB, a company which

validly subsists in good standing under the laws of Malaysia and has full power and authority to own its assets and conduct its business as now owned and conducted as determined by the previous Memorandum of Understanding dated 10th April 2008 and Variation of the Memorandum of Understanding dated 8th October (hereinafter referred to as the 'previous MOUs'); Copy of the Joint Development Agreement dated 8th January 2010 is exhibited in Exhibit C, attached hereto and incorporated herein by this reference.

(D) Pursuant to the letter from Pejabat Tanah Mersing (Ref (89) dlm PTD (MG) 4/1/87/(E)) dated 8th February 2010 addressed to U Farouk, wherein contained the acknowledgement of the Johore State Executive Meeting that all terms and/or conditions stipulated in the Letter of Award, had been fulfilled and satisfied. Whereby HSSB was established pursuant to the Joint Development Agreement above stated which has now been acknowledged by the State as the primary vehicle to satisfy all conditions contained therein in the Letter of Award dated 25th April 2003, specifically condition 1.1 and 1.2. Copy of the Letter dated 8th February 2010 is exhibited in Exhibit D, attached hereto and incorporated herein by this reference.

2.2 Representations and Warranties of Vendors

Each of EK, Goldfield and HSSB jointly and severally represents and warrants that, with respect to the MC1221, the following:

(a) HSSB is in possession of and has the interests in MC1221 as described in Exhibit A and subject to the Underlying Agreements;

2.3 Covenants of Vendors

Each of EK, Kesit, Z Iwaz, Goldfield and HSSB jointly and severally covenants that, with respect to EK, HSSB and MC1221 from the date thereof up to the termination of this Earn-In Agreement, unless otherwise consented to in writing by Damar, the following:

(d) It will in its best endeavour to procure and obtain all such consents, approvals, releases and discharges as may be required by it to effect the transactions contemplated hereby.

5.1 Article V Initial Contribution

(a) Upon the Effective Date of this Earn-In Agreement:

(i) Damar shall pay a sum of CDN$500,000 to the Vending EK Shareholders (allocated between them as directed by the Vending EK Shareholders); and

(ii) Monument shall issue 1.5 million common shares without nominal or par value in the capital stock of Monument to the Vending EK Shareholders (allocated between them as directed by the Vending EK Shareholders)

(iii) In the event MMY is unable to obtain the necessary approval from TSX within two weeks from the Effective date, MMY shall pay the equivalent sum in cash for the 1.5 million shares (hereinafter referred to as 'share for cash') at the conversion rate which is to be based at the average price of shares traded on TSX for the previous 48 hours.

MMY may seek an extension of another two weeks for obtaining the consent from TSX and the agreement to extend must be in writing signed by two directors of EK.

(b) With the payment and settlement of the above payment stipulated in Section 5.1(a)(i) and (ii) thereof, Damar shall acquire a 49 interest in the project on MC1221 through the acquisition of 70% of the issued shares of EK from the Vending EK Shareholders who hereby agree to cause the immediate transfer of 70% of the issued shares of EK to Damar and by so doing Damar will fund an exploration program costing CDN$2,000,000 on MC1221 within the following 2 year period.

(d) On acquiring the 49% interest above and competing the required exploration program and making the results available to all the parties in the form of a report, Damar can make the following election:

(i) after acquiring a 49% interest and completion of exploration expenditures totalling CDN$2,000,000 within the prescribed period Damar can then acquire an additional 21% in the project on MC1221 through the acquisition of the remaining 30% of the issued shares of EK (for an aggregate of 100% of the issued shares of EK from the Vending EK Shareholders who hereby agree to cause the immediate transfer of such remaining 30% of the issued shares of EK to Damar (to bring the Damar interest in the project on MC1221 to 70% as EK will hold 70% of the shares of HSSB which in turn holds 100% of the interest in the project on MC1221) by:

(A) causing the payment of one of the following (at the election of Vending EK Shareholders):

(i) a cash payment of CDN$1,500,000 (which shall exclude remaining RM1.1 million stipulated in Preamble E) by Damar to the Vending EK Shareholders (allocated between them as directed by the Vending EK Shareholders); or

(ii) the issue of 2,500,000 common shares of Monument to the Vending EK Shareholders (allocated between them as directed by the Vending EK Shareholders); and

(B) committing to a further CDN$2,000,000 of Stage II exploration expenditure to be completed within the next 24 months.

[26] Pursuant to cl 5.1(a) the EIA, the second plaintiff paid 500,000 Canadian Dollars. Moreover the first plaintiff issued and transferred 1.5m shares in the first plaintiff to the second defendant and third defendant after having obtained the approval of the Toronto Stock Exchange.

[27] Correspondingly pursuant to cl 5.1(b) of the EIA, the second defendant transferred 49% instead of 70% of the shares in the first defendant (albeit under a common mistake that was only realised in October 2013).

[28] On 14 November 2011, the second plaintiff wrote to the Mersing Forestry Office applying for permit to use the access road leading to the land encompassed in MC1221.

[29] By reason that MC1221 was not transferred to HSSB, the second plaintiff through its Canadian solicitor Messrs Gourley Spencer Wade LLP's letter dated 5 November 2012 notified the defendants of its intention to suspend work under the EIA. By a follow up letter of Messrs Gourley Spencer Wade LLP dated 19 November 2012, the plaintiffs notified the defendants and HSSB that unless the transfer of MC1221 is effected by 30 November 2012, the plaintiffs would rescind the contract for breach by the defendants and HSSB.

[30] The first defendant replied on 24 November 2012 denying the plaintiffs' claim.

[31] Messrs Gourley Spencer Wade LLP again on 4 February and 6 February 2013 wrote to the second defendant and its solicitor, Messrs Sitham & Assoc that unless the mining lease MC1221 is transferred to HSSB within 30 days, the second plaintiff would treat the second defendant to have breached the EIA.

[32] The second defendant through its solicitor, Messrs Sitham & Assoc's letter dated 15 February 2013 replied stating that the second plaintiff is instead in breach of cl 5.1(b) of the EIA. On 16 February 2013, U Farouk also wrote a letter of similar effect to the plaintiffs.

[33] The status quo remained and the plaintiffs filed this suit on 1 August 2013.

[34] The MC1221 eventually lapsed on 15 August 2014.

A CONTENTION OF THE PARTIES

[35] From the pleadings and as clarified in the closing submissions of counsel, the plaintiffs primarily contend that the defendants were in breach of warranty or representation for the non-transfer of MC1221 from U Farouk to HSSB. As the result, the plaintiffs seek, inter alia, a declaration that the EIA is rescinded for breach, refund of the payment of Canadian Dollars 500,000 and retransfer of the 1.5m shares in the first plaintiff.

[36] On the other side, the defendants contend that there was no warranty or representation that HSSB was the owner of MC1221, hence the plaintiff's contention that the EIA was entered based on the warranty or representation that the MC1221 would be transferred is wholly erroneous because HSSB was formed for the purpose of carrying out mining works pursuant to MC1221 in compliance with the express stipulations of the Johor State Government. Besides that, the transfer of MC1221 is not a precondition to the EIA becoming effective; otherwise the plaintiffs should have waited for the transfer to be effected before entering into the EIA. The plaintiffs hence assumed the commercial risks by entering into the EIA knowing well that it is the prerogative of the Johor State Government in approving the transfer. Furthermore the defendants contend that the second plaintiff was in breach of contract by its failure to further fund and carry out the exploratory works as required by cl 5.1(b) of the EIA.

FINDINGS OF THE COURT

[37] The principal dual connected issues for determination in this suit center on the construction of the EIA as to whether the transfer of the MC1221 is a condition thereunder, and if so, whether the defendants were culpable for the non-transfer thereof.

[38] The resolution of issues relating to the construction/interpretation of contracts is often a difficult endeavour notwithstanding that the principles involved are fairly settled from case law as well as provided in the Evidence Act 1950.

[39] The background to the formation of the contract is always relevant to appreciate the proper contextual setting when construing it: see *Prenn v Simmonds* [1971] 3 All ER 237 which was adopted by Federal Court in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 2 AMR 205; [2010] 1 CLJ 269 and recently again applied by the Court of Appeal in *MBF Holdings Bhd & Anor v Dato' Loy Teik Ngan & Anor* [2015] 1 AMCR 21. In that case, Varghese George Varughese JCA said as follows:

[42] Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. *First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract.* See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98. As Lord Clyde said in *Bank of Credit and Commerce International SA v Munawar Ali:*

> The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. *The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic*. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances (Emphasis is mine.); see also the court of appeal case of *Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd* [2007] 2 CLJ 127.

[40] Furthermore in the Federal Court case of *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625, Gopal Sri Ram JCA (later FCJ) said as follows:

> The law leans in favour of upholding bargains and not in striking them down willy-nilly. And its declared policy finds expression in the speech of Lord Wright in *Hillas & Co v Arcos Ltd* [1932] All ER Rep 494, where he said:
>
> > *Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business, may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being, too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat quam pereat. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.*
>
> This principle applies not only to documents drafted by laymen but also to those prepared by lawyers. See *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] 129 CLR 99. (Emphasis added.)

[41] There is also the Court of Appeal case of *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357; [2003] 4 CLJ 294 wherein Mohd Ghazali Yusoff JCA (later FCJ) said the following:

> The intention of the parties were clear ... In *The Royal Selangor Golf Club v Anglo-Oriental (Malaya) Sdn Bhd* [1990] 1 CLJ 995, Lim Beng Choon J said:
>
> > In considering the disputes of the parties I must first of all bear in mind the general principles of construction of contract as enunciated in the *National Coal Board v Wm Neill & Son (St Helen)* [1984] 1 All ER 555 where it is said at p 560:
> >
> > > The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; and (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.
> >
> > In *Central Bank of India v Hartford Fire Insurance Co Ltd AIR* [1965] SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *Wm Neill & Sons (St Helens) Ltd* case when it says at p 1290:
> >
> > > *Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.* (Emphasis added.)

[42] Thus it is my duty to ascertain objectively the presumed intention of the parties in construing the contract in light of the background facts. The subjective intention of the parties of what they meant, understood or perceived is irrelevant and this is bolstered by ss 92–94 of the Evidence Act 1950 which provide:

> 92 Exclusion of evidence of oral agreement
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> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:
>
> Provided that –
>
> (a) any fact may be proved which would invalidate any document or

which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant to or inconsistent with the express terms of the contract; and

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

ILLUSTRATIONS

(a) A policy of insurance is effected on goods 'in ships from Penang to London'. The goods are shipped in a particular ship, which is lost. The fact that that particular ship was orally excepted from the policy cannot be proved.

(b) A agrees absolutely in writing to pay B RM1,000 on the first of March 1893. The fact that at the same time an oral agreement was made that the money should not be paid till the 31 March cannot be proved.

(c) An estate called 'the Kranji Tea Estate' is sold by a document which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the document cannot be proved.

(d) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B as to their value. This fact may be proved.

(e) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions on

the ground that that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words: 'Bought of A a horse for RM300'. B may prove the verbal warranty.

(h) A hires lodgings of B and gives B a card on which is written: 'Rooms RM80 a month'. A may prove a verbal agreement that these terms were to include partial board. A hires lodgings of B for a year, and a regularly stamped agreement drawn up by an attorney is made between them. It is silent on the subject of board. A may not prove that board was included in the terms verbally.

(i) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount A may prove this.

(j) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

93 Exclusion of evidence to explain or amend ambiguous document

When the language used in a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

ILLUSTRATIONS

(a) A agrees in writing to sell a horse to B for RM500 or RM600. Evidence cannot be given to show which price was to be given.

(b) A document contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

94 Exclusion of evidence against application of document to existing facts

When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

ILLUSTRATION

A conveys to B by memorandum of transfer 'my estate at Kranji containing 100 acres'. A has an estate at Kranji containing 100 acres. Evidence may not be given of the fact that the estate meant was one situated at a different place and of a different size.

[43] Bearing these principles in mind, I now seek to ascertain the presumed intention of the parties on the transfer of MC1221 as encapsulated in the EIA. A

[44] It is common ground that the mining lease MC1221 has been granted to U Farouk vide the letter of award. There is therein the requirement for the setting up of an incorporated company that is 40% owned by Bumiputeras of which 20% must be by Yayasan Pelajaran Johor to undertake the exploratory and mining works. The mining lease must be subleased to the aforesaid company. Subject thereto, the mining lease cannot be transferred, charged or disposed in any way without the prior approval of the Johor State Government. B C

[45] Pursuant thereto, U Farouk and the first defendant vide the MOU and JDA established HSSB as the company to undertake the exploration and mining works. The ownership of HSSB was structured as 25% belonging to U Farouk, 55% belonging to the first defendant and 20% belonging to Yayasan Pelajaran Johor. This utilisation of HSSB was subsequently approved by the Johor State Government. D

[46] In the meantime, there was the Johor Bahru High Court bankruptcy suit commenced by HSBC Bank Malaysia Bhd against U Farouk. Consequently the first defendant and U Farouk vide the VMOU agreed to apply for the transfer of the mining lease MC1221 to HSSB so that all the efforts and investment put into the venture would not be rendered futile if U Farouk is adjudicated a bankrupt. They also agreed to suspend the commencement of the preliminary exploratory drilling until the approval of the transfer of the mining lease MC1221 by the Johor State Government and registration thereof in the name of HSSB. E F

[47] With this backdrop, the parties hereto together with Goldfield Assets Sdn Bhd and HSSB executed the EIA on 12 September 2011. At that point in time, the original mining lease MC1221 was due to expire in about three years. The parties were aware of the prior written application and correspondences made between 9 July 2008 and 10 February 2010 to seek the approval of the Johor State Government to transfer the lease. When the EIA was executed, the plaintiffs were also aware that the aforesaid approval has yet to be obtained. G H

[48] Looking at the provisions in the EIA as a whole, I observed that the aforesaid backdrop has been expressly recited in recitals A to D particularly the JVA that is appended as exh C to the EIA. There is also cl 2.2(a) which in my view dealt with the transfer of the mining lease MC1221. In that clause, the first defendant, Goldfield Assets Sdn Bhd and HSSB have expressly represented and warranted that HSSB has interests in the mining lease as described in the letter of award and subject to the underlying agreements; that must in my view mean the JVA and its predecessor MOU and VMOU. My understanding is I

that the aforesaid representation and warranty constituted a firm assurance that the contemplated transfer of the mining lease MC1221 to HSSB would materialise in the matter of time. This is undoubtedly beyond HSSB only being utilised as the incorporated vehicle that is required in the original mining lease as contended by the defendants.

[49] Since the transfer of the mining lease MC1221 has neither yet been approved nor effected at the point of execution of the EIA, it must rationally in my view have been the presumed intention of the parties that the transfer ought to effected as represented and warranted within a reasonable time thereafter; see s 47 of the Contracts Act 1950. Furthermore and even though an application for the transfer has earlier been made prior thereto, it is also my view that the defendants, Goldfield Assets Sdn Bhd and HSSB have the obligation pursuant to cl 2.3(d) of the EIA to utilise their best endeavours to procure and obtain that contemplated approval. In the Court of Appeal case of *Damasara Realty Bhd v Bungsar Hills Holding Sdn Bhd & Anor* [2011] 6 MLJ 170; [2011] 4 CLJ 16, Hishamuddin Mohd Yunus JCA said the following in respect of a best endeavour contractual provision therein:

> [32] In cl 3.1, the appellant agrees to use its best endeavours to procure that the development is begun and completed in accordance with the Agreement, and the sale of units constructed thereon 'is effected in a timely manner' ...
>
> [42] We are of the view that the appellant was under an obligation to apply for a development order within a reasonable time and after having obtained the development order to diligently develop the development property to completion within the 15 year period. *In our opinion, it is implicit in the agreement that time is the essence and the obligation to develop the development property is to be carried out with due diligence and in accordance with the provisions of the property development agreement, particularly, the Fourth Schedule. Several provisions of the agreement lend support to such an interpretation. Examples of such clauses are cl 3.1 (the appellant to use its best endeavours to ensure that the development is begun and completed in accordance with the agreement)*, cl 5.2 (providing for the setting up of a monitoring committee), and s 1.3 of the Fourth Schedule (the appellant to complete each phase of the development within three years of its commencement). Therefore, we agree with the learned judge as to the following view expressed by him:
>
> > The real nature of the transaction in the instant case is that the parties intended to have the subject land be developed within the 15 years period. It would be utterly absurd to hold on to the plaintiff's view that they have 15 years to start the project and if they decide to start it by obtaining the development order on the 14th year, they will have another 3 years to complete it. It cannot be so.
>
> [43] The property development agreement is a commercial contract. *Being a commercial contract, the agreement must be construed in a commercially sensible manner, that is to say, in a manner in which a reasonable commercial person would construe them*. Lord Steyn, in his judgment in the House of Lords case of *Mannai Investment v Eagle Star* [1997] 3 All ER 352, states the rationale for such an approach:

> In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.

[50] The fair and broad interpretation of the EIA in my view require that the approval of the transfer of the mining lease MC1221 be obtained within the reasonable time of one year from the execution of the EIA with best endeavours put in by the relevant parties to seek the approval of the Johor State Government since the original mining lease would lapse in about two years thereafter. This is the sensible business expectation as it would otherwise be sheer commercial stupidity on the part of the plaintiffs as coined by PW3. It is so because there was the real risk of forfeiture of the original mining lease if U Farouk is adjudicated a bankrupt. By then, the whole substratum of the EIA would have been lost. Although I am mindful that the approval of the transfer of the mining lease is still the prerogative of the Johor State Government, I am however unable to accept the defendants' apposite contention that obtaining of the approval of the transfer of the mining lease MC1221 or otherwise is instead the commercial risk assumed by the plaintiffs. In other words, the plaintiffs, particularly the second plaintiff are bound by the EIA in any event. This proposition is in my view out of sync, if not in contradiction, with the express provisions in cll 2.2(a) and 2.3(d) of the EIA read together as explained in paras 47–49 herein above. Besides, if that was indeed the case, the parties would undoubtedly have inserted another clear express provision to that effect as it involved substantial upfront financial injection on the part of the plaintiffs that would be thrown away and wasted if that risk eventuated. It was not so inserted by reason that isn't the contemplated bargain struck by the parties. This is so because they were confident of obtaining the approval of the transfer of the mining lease with the further input of best endeavours by the defendants, Goldfield Assets Sdn Bhd and HSSB to obtain it. Consequently, it is irrelevant that the plaintiffs ought to have waited for the approval of the transfer of the mining lease before executing the EIA as so contended by the defendants.

[51] From the evidence before me, the defendants were unable to prove that they have since the execution of the EIA utilised their best endeavours to obtain the approval of the transfer of the mining lease MC1221 from the Johor State Government. They relied on the previous application and correspondences made and merely awaited for the outcome. This is undoubtedly a breach of contract on their part for non fulfilment or performance of cl 2.3(d) of the EIA. The approval of the transfer was not obtained by the time the plaintiffs commenced this suit which is more than one year since the execution of the EIA. On the other hand, the defendants cross contended that the plaintiffs

were instead in breach of contract for not making further financial injection and commence exploratory work pursuant to cl 5.2(b) of the EIA. I however find the defendants' contentions to be flawed because pursuant thereto, the second plaintiff has a period of two years to make the financial injection that wasn't yet due when this suit was commenced. Moreover and more pertinently by the clear provisions in cl 1D of the VMOU and cl H1 of the JV agreement that is incorporated by reference into the EIA, the second plaintiff is only obliged to commence exploratory work upon securing the approval of the transfer of the mining lease MC1221. Put simply, the plaintiffs were not in breach of contract.

[52] In the circumstances, I find and hold that the second plaintiff is entitled to rescind the EIA around March 2012 when the second plaintiff intimated its intention to do so vide its solicitor's letters. Ordinarily an innocent party so circumstanced would have forthwith rescinded the contract; see *LSSC Development Sdn Bhd v Thomas a/l Iruthayam and Anor* [2007] 4 MLJ 1; [2007] 2 CLJ 484. That notwithstanding, it is permissible at law for the innocent party to treat the contract as still subsisting and later seek a declaration of the court that the contract be rescinded as held in *Societe Maritime et Commerciale v Venus Steam Shipping Co Ltd* (1904) 9 Com Cas 289. The plaintiffs sought precisely that in this suit. During the clarification, the plaintiffs have withdrawn their claim for damages and are now only seeking for the refund of the 500,000 Canadian Dollars paid and the return of the 1.5m shares in the first plaintiff. In other words, the plaintiffs' remedy is restitution for total failure of consideration; see *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269. There has been unjust enrichment by the defendants in that they must not profit from their failure to fulfil their contractual bargain to utilise their best endeavours and obtain the approval of the transfer of the mining lease as represented and warranted.

[53] The plaintiffs hence relied on s 65 of the Contracts Act 1950 which provides:

> 65 Consequences of recission of a voidable contract
>
> When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore the benefit, so far as may be, to the person from whom it was received.

In the Privy Council case of *Muralidhar Chatterjee v International Film Co Ltd* AIR 1943 PC 34, Sir George Rankin held as follows:

'The use of the word voidable' is immaterial. Whenever one party to a contract has the option of annulling it, the contract is voidable, and when he makes use of that option the agreement becomes void.

It follows, in my view, that any person who has received any advantage under the agreement or contract that becomes void is bound to restore it to the person from whom he received it. It would be a case of unjust enrichment at the expense of the plaintiff, an innocent party.

[54] The law on unjust enrichment and restitution has recently been explained by Azahar Mohamed FCJ in the Federal Court case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453 at pp 491–496:

[107] We pause here for a moment to underline the significance of the law of unjust enrichment in relation to all the rights of the parties to a contract which has been validly terminated. The critical issue that needs to be addressed is what constitutes unjust enrichment and undue benefit, and in what manner should a purchaser of vacant land be granted restitutionary relief when he has constructed a building on the said piece of land pursuant to and expressly permitted by a contract between him and the vendor. In our view, the following issues are important to determine the outcome of this appeal. Is it fair and equitable for the purchaser upon the termination of contract to be awarded only the cost of construction of the building, in this case the mall, or the market value of the mall?

[108] This is a good place to point out that remedies for contractual disputes are generally compensatory in nature, with damages assessed based on the loss suffered by the claimant. Restitutionary remedies, on the other hand, focus on any unjust enrichment to a party at the claimant's expense. It is aimed of restoring that enrichment to the claimant. It is clear on principle and on authority that the idea of justice behind this aim is that no one should be made richer through loss to another.

[109] In *Goff & Jones: The Law of Unjust Enrichment*, para 1–08, it is stated:

> Whatever may be the underlying moral justifications for the award of restitution all these cases, the 'unjust' element in 'unjust enrichment' is simply a 'generalisation of all the factors which the law recognises as calling for restitution'. In other words, unjust enrichment is not an abstract moral principle to which the courts must refer when deciding cases, it is an organising concept that groups decided authorities on the basis that they share a set of common features, namely that in all of them the defendant has been enriched by the receipt of a benefit that is gained at the claimant's expense in circumstances that the law deems to be unjust. The reasons why the courts have held a defendant's enrichment to be unjust vary from one set of cases to another, and in this respect the law of unjust enrichment more closely resembles the law of torts (recognising a variety of reasons why a defendant must compensate a claimant for harm) than it does the law of contract (embodying the single principle that expectations engendered by binding promises must be fulfilled).

[110] Restitution simply means that a party who has received a benefit must restore the benefit received by him. The theoretical foundation of the right to restitution

remedy as it is understood today is that it is founded on the law of unjust enrichment which fall outside the domains of contract and tort. The law of contract/tort and the law of unjust enrichment are conceptually distinct. Unjust enrichment describes a cause of action. On the other hand restitution describes a remedy. Restitution as a response to wrongdoing is therefore a different topic from restitution as a response to unjust enrichment (see *Goff & Jones: The Law of Unjust Enrichment* para 1–04). The courts have found it necessary to make available, independent of the law of contract and civil wrongs, for the restoration of benefits on the grounds of unjust enrichment.

[111] As stated by Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at p 61:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derive from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

[112] Since then English law has recognised an independent law of unjust enrichment by recognising a claim for restitution based on unjust enrichment. According to *Goff & Jones: The Law of Unjust Enrichment* (see para 1–5), the highest courts have now conclusively recognised that unjust enrichment is a distinct source of rights and obligations in English private law that ranks alongside contract and civil wrongs in importance and accordingly calls for discrete stand-alone treatment. This was shown in a number of cases which were cited by learned counsel for the defendant, namely *Banque Financiere de la Cite v Parc (Battersea) Ltd and Others* [1999] 1 AC 221, *Rowe v Vale of White Horse DC* [2003] EWHC 388 (Admin), *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47; [2004] 1 WLR 2775, *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449; [2009] 1 WLR 1580, *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and Another* [2008] 1 AC 561 and *Investment Trust Companies v HMRC* [2012] EWHC 458 (Ch) ...

[117] The above passages from the judgments of the House of Lords are instructive and are significant contribution to the development of law of unjust enrichment. *The principle underlying the cases of Banque Financiere de la Cite v Parc (Battersea) Ltd And Others* and *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and Another is that, in the context of the present case, a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that:*

(a) *The plaintiff must have been enriched;*

(b) *The enrichment must be gained at the defendant's expense;*

(c) *That the retention of the benefit by the plaintiff was unjust; and*

(d) *There must be no defence available to extinguish or reduce the plaintiff's liability to make restitution.*

[118] Nearer home, there is now no longer any question that unjust enrichment law is a new developing area of law which is recognised by our courts. That the principle of unjust enrichment is the basis to justify an award of restitutionary relief can be seen in *Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 229; [1999] 5 CLJ 31 and in *Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ 59; [2012] 4 CLJ 589. Nevertheless, it has to be said that despite the increase in judicial reference to the expression of unjust enrichment to justify an award of restitutionary reliefs, the law of unjust enrichment is still in its formative stage in our jurisdiction (see article entitled '*An Introduction to the Law of Unjust Enrichment*' [2013] 5 MLJA 1 by Alvin W-L See). *In our view, the time has come for this court to recognise the law of unjust enrichment by which justice is done in a range factual circumstances, and that the restitutionary remedy is at all times so applied to attain justice.* (Emphasis added.)

[55] I am satisfied on the facts before me that the plaintiffs herein have met the four ingredients of unjust enrichment enunciated by the federal court to sustain their restitutionary claim. This is plainly so because neither the purpose of the EIA materialised nor the defendants performed their part of the bargain stipulated in the EIA save for the transfer of the shares in the first defendant to the second plaintiff. It is therefore clearly inequitable for the defendants to indefinitely hold on to the financial injection made by the plaintiffs when the EIA is rescinded in the absence of fault of the plaintiffs. Otherwise it tantamount to a forfeiture that obviously cannot be sanctioned by the court. Consequently, there is in my view the absence of basis for the defendants to retain the benefit derived from the EIA. There was substantial nearing total failure of consideration.

CONCLUSION

[56] For the foregoing reasons, it is my view that the plaintiffs have a meritorious case. Accordingly I enter judgment for the plaintiffs and declare that the Earn-In agreement dated 12 September 2011 is rescinded. I further order that the defendants refund the second plaintiff 500,000 Canadian Dollars within 45 days from the date hereof together with simple interest at 5%pa from 1 August 2013 until full realisation. I also order a mandatory injunction that the second defendant and third defendant whether by themselves or their nominees, servants or agents return the 1.5m shares in the first plaintiff within 45 days from the date hereof by way of surrendering the original share certificates to the first plaintiff together with the necessary documentation by the second defendant and third defendant empowering the first plaintiff to cancel those shares. Corresponding thereto, I order a mandatory injunction that the second plaintiff whether by itself or its nominees, servants or agents return the 121,030 shares in the first defendant also within 45 days from the date hereof by way of surrendering the original share certificates to the first defendant together with the necessary

documentation by the second plaintiff empowering the first defendant to cancel those shares. Costs of RM30,000 shall be borne by the defendants.

Order accordingly.

Reported by Afiq Mohamad